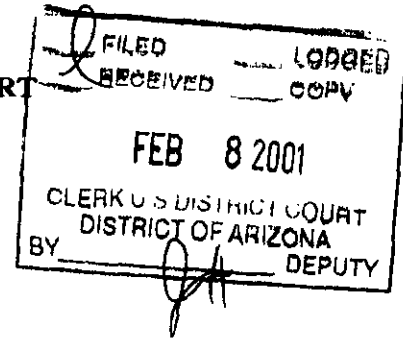


IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA



MARK A. KOCH,

Plaintiff,

vs.

SAMUEL LEWIS, et al.,

Defendants.

No. CIV. 90-1872 PHX-JBM

MEMORANDUM AND ORDER

Defendants Lewis, Stewart, Herman and Harkins move for judgment on the pleadings with respect to all four counts. That motion is continued for further discussion with respect to defendant Stewart's motion to dismiss Count I and is otherwise denied.

One aspect of the motion is that the claims in Counts I, III and IV are barred by Edwards v. Balisok, 520 U.S. 641 (1997), on the ground that they challenge disciplinary proceedings implicating the loss of good time credits and the timing of parole eligibility. Defendants contend that plaintiff must overturn those proceedings by habeas corpus and cannot proceed with a §1983 claim in the absence of a successful petition for a writ of habeas corpus.

Defendants can take some comfort from this court's Memorandum Opinion and Order of April 24, 2000, where we referred on several occasions to the punitive impact of the validations of plaintiff as a member of a security threat group (STG). At the same time we recognized that validation was not a typical disciplinary action for misconduct leading to loss of good time credits and the extension of the length of imprisonment. Indeed, defendants characterized validation as a security classification, not requiring any evidence of misconduct

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-- a civil correctional regulation designed to effectuate a safer prison environment. Defendants do not claim that plaintiff is being punished for doing something unlawful. Rather, they say, he has been segregated because he has been associated with a group with a high potential for serious mischief. Plaintiff now concedes that the prior validations, as applied to him, have had no impact on either his good time credits or his parole eligibility. As we earlier explained, we think Sandlin v. Conner, 515 U.S. 472 (1995), raises due process concerns in which the deprivation of liberty, occasioned by long continued and indefinite segregation in a supermax facility, when there has been no claim of institutional misconduct, has to be balanced against the prison management concerns involved. Plaintiff's claim is not about good time credits; it is about long continued segregation without justification. That, at some future time, a set of conditions might arise that could affect good time credits or parole eligibility should plaintiff prevail here is not a basis for requiring plaintiff to proceed by way of habeas corpus.

Defendants also contend that Counts II, III and IV are barred by the applicable statute of limitations, which is two years. Plaintiff filed a supplemental complaint on February 7, 1996, in which he complained about the threat of validation proceedings. They had not yet taken place, but they did proceed immediately thereafter. When the second amended complaint was filed more than two years had passed since the 1996 and 1998 validations. Defendants argue that a threat of proceedings and the proceedings themselves are totally unrelated and that the second amended complaint attacking the 1996 and 1998 validations comes too late. We disagree.

The validation issue was put into play by this *pro se* plaintiff in 1996, as the defendants were well aware. It has been in play ever since, although plaintiff was initially rebuffed in his

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efforts to file a second supplemental complaint. Indeed, this court treated his motion for reconsideration as a motion to amend, this within two years of the initial validation, and the 1996 and 1998 validations have been one focus of this lawsuit even longer than that.

Defendant Stewart has been a party in his official capacity since the case was filed. The second amended complaint seeks damages against him in his individual capacity. He moves for judgment on those individual capacity claims for the period prior to October 25, 1998, as time-barred. That motion raises issues that have not been explored with the depth they require. Compare Hill v. Shelander, 924 F.2d 1370 (7th Cir. 1991), with Lovelace v. O'Hara, 985 F.2d 847 (6th Cir. 1993). We think the parties need to address those issues further, with plaintiff filing a memorandum within 21 days, defendant Stewart responding within 14 days thereafter and plaintiff replying 10 days later. We recognize that those issues do not have any real impact on trial preparation.

Feb. 7, 2001.


JAMES B. MORAN
Senior Judge, U. S. District Court

Copies to all parties of record.